

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

**Josef F. Boehm, Allen K.
Bolling, and Bambi Tyree,
Defendants.**

CASE NO. : A05-0085 (JKS)

Plaintiff has moved for partial summary judgment against the defendant. Plaintiff argues that the use of collateral estoppel precludes Boehm from litigating issues of liability and punitive damages. While use of collateral estoppel may in some instances allow use of a prior conviction to simplify civil litigation initiated by a crime victim, it may not do so here. Plaintiff's motion is without legal or factual merit and must be denied.

The issues to be considered on a motion for summary judgment

1 are not those set forth in the pleadings but are those presented by
2 the materials submitted in support of the summary judgment motion.
3 Yates v. Transamerica Ins. Co., Inc., 928 F.2d 199, 202(6th Cir. 1991)

4 In making its determination, however, the court must look to
5 the evidence offered by the nonmoving party in the light most
6 favorable to that party, must accept all justifiable inferences on
7 the nonmoving party's behalf, and must reject any contrary evidence
8 and inferences. See Adickes v. S. H. Kress & Co., 398 U.S. 144,
9 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

10 Overall, the nonmoving party needs to show that the record
11 contains sufficient specific facts--by demonstrating that the
12 moving party either ignored or mischaracterized relevant facts--
13 such that there exists a genuine dispute of material fact. Raising
14 alternate inferences, on the other hand, might be sufficient to
15 defeat a motion for summary judgment. Because the court must draw
16 all reasonable inferences in a light most favorable to the
17 nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
18 250-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202, 4 Fed. R. Serv. 3d 1041
19 (1986).

20
21 Moreover, not only must there be no genuine issue of fact, in
22 order for summary judgment to be granted there must also be no
23 genuine issue as to the inferences to be drawn from the facts.
24 World-Wide Rights Ltd. Partnership v. Combe Inc., 955 F.2d 242 (4th
25 Cir. 1992). Where reasonable minds could differ on inferences
26 arising from undisputed facts, the court should deny summary
27 judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106
28 S. Ct. 2505, 91 L. Ed. 2d 202, 4 Fed. R. Serv. 3d 1041 (1986).

1 Plaintiff's relies on the plea agreement to show that there is
2 no genuine issue of material fact in dispute. Furthermore, argument
3 will show that plaintiff cannot clearly demonstrate that (1) the
4 elements of her tort claims have been met through the plea
5 agreement, (2) the issues decided in the federal criminal case
6 against Boehm are identical to the elements of her asserted tort
7 claims; (3) the issues were resolved in the first action by a final
8 judgment on the merits; and (4) the determination of the issues
9 were essential to the final judgment.

10
11
12 **III. COLLATERAL ESTOPPEL STANDARDS**

13 Collateral estoppel or "issue preclusion," recognizes that
14 suits addressed to particular claims may present issues relevant to
15 suits on other claims. In order to effectuate the public policy in
16 favor of minimizing redundant litigation, issue preclusion bars the
17 relitigation of issues actually adjudicated, and essential to the
18 judgment, in a prior litigation between the same parties. It is
19 insufficient for the invocation of issue preclusion that some
20 question of fact or law in a later suit was relevant to a prior
21 adjudication between the parties; the contested issue must have
22 been litigated and necessary to the judgment earlier rendered.

23
24 Kaspar Wire Works, Inc. v. Leco Engr'g & Mach., Inc., C.A.5th,
25 1978, 575 F.2d 530, 535-536.

26 As previously stated, Plaintiff's reliance on the plea
27 agreement is misguided as she cannot support a finding of issue
28 preclusion.

1
2 **IV. LEGAL ARGUMENT**

3
4 **A. The elements of the actions differ and they may not be found to be identical.**

5 Before collateral estoppel may apply, Plaintiff must
6 demonstrate that the issues actually litigated in the first action
7 are *identical* to those in the second. Pardo v. Olson and Sons, 40
8 F.3d 1063 (9th Cir. 1994). It is insufficient that the issues are
9 similar or related. Id. Plaintiff bears the burden of proving
10 identically as part of her general burden of persuasion to
11 establish the prerequisites of issue preclusion. See Lundborg v.
12 Phoenix Leasing, Inc., 91 F.3d 265, 272 (1st Cir. 1996). She is
13 required to 1) produce evidence that an issue was actually
14 litigated and decided in a prior litigation, and 2) that the prior
15 proceeding offered an opportunity and motivation for full and fair
16 litigation. Id. If the party cannot do so or the court cannot
17 ascertain what was litigated and decided, the issue of preclusion
18 cannot operate. Id.

19
20 Plaintiff has not met her burden. Plaintiff argues that the
21 facts necessary to recover under this civil action are conclusively
22 established by the plea agreement and the facts established in the
23 corresponding criminal action. Plaintiff's motion is silent
24 regarding what was "actually litigated" in the criminal matter.
25 Review of the issues before the federal court, however, will show
26 that the issues are not identical as required.

27
28 For current purposes Boehm does not challenge the fact that he

1 was convicted of two federal conspiracy crimes. However, those
2 crimes are not identical to the civil torts asserted here and
3 collateral estoppel may not be used to prevent Boehm from defending
4 himself. The doctrine of collateral estoppel acts only to preclude
5 a criminally convicted defendant from relitigating the "elements" of
6 crime for which he was convicted. See Howarth v. State, Public
7 Defender Agency, 925 P.2d 1330, 1334-35 (Alaska 1996). The court is
8 to compare the elements of the causes of action to determine if the
9 issues are identical and appropriate for issue preclusion. Id. A
10 careful inquiry and comparison is required. Pardo, supra; see also
11 Moore's Federal Practice P. 132.02.[2][a] (3d ed. 2003).

12
13 Plaintiff's analysis on this point is wanting. Indeed, in her
14 motion, Plaintiff does not identify the elements extant in the
15 federal criminal matter, or the claims made in the instant matter,
16 much less compare them. The appropriate comparison of the elements
17 compels the conclusion that no preclusive effect should be given
18 here.

19 i. Issue preclusion is inappropriate when the first count of the
20 federal case is compared to the causes of action in this civil
21 suit because the issues are not identical.

22 In the federal matter Boehm was convicted of two offenses.
23 Count 1 alleged that he and his co-defendants conspired to commit
24 the crime of sex trafficking of children, in violation of 18 U.S.C.
25 § 371. The elements of this crime are, as follows:

- 26 1. there was an agreement between two or more
27 individuals to commit the crime of sex
28 trafficking of children;
2. the defendant became a member of the
conspiracy knowing of at least one of its

1 objects and intending to help accomplish it;
2 and,

3 **3. one of the members of the conspiracy**
4 **performed at least one overt act for the**
5 **purpose of carrying out the conspiracy.**

6 Conspiracy is a specific intent crime. U.S. v. Blair, 54 F.3d
7 639 (10th Cir. 1995). In Blair, the court stated: 'The specific
8 intent required for the crime of conspiracy is in fact the intent
9 to advance or further the unlawful object of the conspiracy. Id. at
10 642 [citations omitted]. It is not necessary that the individual in
11 fact commit any direct act. Id. The underlying overt act sustaining
12 Count I was not identified in federal court. It was not identified
13 in the charging document nor in the written plea agreement. Since
14 the act was not specified, it cannot be "identical" to the
15 particular acts asserted here.

16 Thus, this criminal charge did not encompass any overt act
17 directed at Plaintiff. A conviction in Count I did not require that
18 Boehm himself in fact attempt or complete any misconduct directed
19 at Plaintiff. It was sufficient that he agree with other co-
20 conspirators to advance a conspiracy of which she may or may not
21 have been involved. In contrast, the gravamen of each of the torts
22 claimed by Plaintiff is that misconduct expressly directed at her
23 by Boehm did in fact occur. These issues are not identical and
24 collateral estoppel may not apply. Howarth, supra.

25 None of the claims asserted by Plaintiff are conspiracy
26 counts. By virtue of his plea to the two aforementioned
27 conspiracies, there is simply no demonstration that Boehm had sex
28 with Plaintiff, or distributed any cocaine to her.

1 The factual underpinning of the federal conspiracy charges
 2 underscores the problem with providing preclusive effect to the
 3 instant claims. As noted, the essence of a conspiracy is the
 4 agreement to engage in nothing more than one of the overt acts.
 5 Again, the plaintiff did not demonstrate that any of the elements
 6 in the criminal charges constitute elements of her civil claims.
 7 Conspicuously absent in either the charges or plea agreement is any
 8 allegation, much less admission, that Boehm had sex with the
 9 plaintiff, enslaved her, or distributed cocaine to her. Yet the
 10 torts brought in the civil matter mandate no less.

11
 12 **ii. Issue preclusion is inappropriate when the second count of the**
 13 **federal case is compared to the causes of action in this civil**
 14 **suit because the issues are not identical.**

15 In Count II of the federal case Boehm was convicted of
 16 conspiracy to distribute controlled substances to person under 21
 17 years of age, in violation of Title 21, U.S.C. §§ 846, 841(a)(1),
 18 (b)(1)(A), and 859(a). The elements of this crime are, as follows:

- 19 1. there was an agreement between two or more
 20 individuals to distribute more than 50 grams of
 21 cocaine base to persons under 21; and
- 22 2. the defendant became a member of the
 23 conspiracy knowing of at least one of its
 24 objects and intending to help accomplish it.

25 Plaintiff has not defined the elements of the torts she claims
 26 in her five separate claims for relief: violation of civil rights
 27 (Count 1); sexual trafficking of a minor(Count 2); distribution of
 28 controlled substances to a minor(Count 3); intentional infliction
 of emotional distress (Count 4); and punitive damages(Count 5). The
 defense will not presume to define them for her.

1 As to Count 2 and 3 of the civil case, the only counts in which
2 potential overlap can be argued; Plaintiff's case must fail because
3 identical issues do not exist. Again, plaintiff's argument fatally
4 suffers from the fact that it was unnecessary to the federal case
5 that Boehm in fact provide a controlled substance specifically to
6 Plaintiff or that he conspired to commit the crime of sex
7 trafficking specifically with plaintiff while that issue is
8 absolutely necessary to the current case. Identical issues do not
9 exist and issue preclusion is inappropriate.
10
11

12 **B. Issue preclusion is inappropriate because the issue of whether**
13 **Plaintiff was a "victim" was not resolved in the first action**
14 **by a judgment on the merits. Nor was it essential to a final**
15 **determination of the case.**

16 The requirement the issue sought to be precluded be identical
17 to that raised in the subsequent action is related to the
18 requirement that the issue be resolved by a judgment on the merits.
19 A judgment on the merits occurs when an issue is raised, contested
20 by the parties, submitted for determination by the court, and
21 determined. E.g. *Raspanti v. Keaty* (In re Keaty), 397 F.3d 264,
22 271-272 (5th Cir. 2005). In this case no judgment includes
23 resolution of the issue Plaintiff seeks conclusively proven, i.e.
24 that she was "victimized" by Boehm. Nor was such a determination
25 essential to support the plea.

26 The doctrine of collateral estoppel rests on the public policy
27 that it is fair to hold a party to a result when they have
28 previously had the opportunity and motivation to fully litigate the

1 question. *Schiro v. Farley*, 510 U.S. 222 (1994); *Sea-Land Serv. V.*
2 *Gaudet*, 414 U.S. 573, 593 (1974) (prior action acts as estoppel
3 "only as to those matters in issue or points controverted, upon
4 determination of which the finding or verdict was rendered");
5 *Commissioner v. Sunnen*, 333 U.S. 591 (1948) (estoppel only as to
6 matters in second proceeding actually presented or determined in
7 the first suit). The party must have had substantial motivation to
8 litigate the issue in both contexts. *Id.* In other words, the issue
9 must be "material" to both cases. *S.E.C. Monarch Funding Corp.*, 192
10 F.3d 295 (2nd Cir. 1999). Thus, similarity of fact as well as
11 identity of legal issue must exist before the public policy
12 allowing issue preclusion is triggered. *Id.* These requirements
13 exist to insure that issues which were tangential to the initial
14 action do not subsequently assume unanticipated importance.

15
16 Plaintiff's status as a victim was tangential rather than
17 material to the federal case. Tangential issues are not entitled to
18 issue preclusion because to do so violates the underlying public
19 policy which requires both fair opportunity and sufficient
20 motivation to litigate as rationale for the doctrine. See e.g.
21 *Diplomat Elc. Inc. V. Westinghouse Elc Supply Co.*, 430 F.2d 38, 45
22 (5th Cir. 1970) (where court in former action decided an issue that
23 was not submitted by the parties in their pleadings, that ruling is
24 not subject to collateral estoppel). Also *Appley v. West*, 832 F.2d
25 1201 (7th Cir. 1987) (amount of restitution is "immaterial" and not
26 subject to collateral estoppel) (victim identity should be
27 analogous). When the fairness and efficiency rationales for
28 collateral estoppel fail, courts will not apply the rule. *S.E.C. v.*

1 Monarch Funding Corp., 192 F.3d 295, 304 (2nd Cir. 1999).

2 Plaintiff's status as a "victim" of the conspiracy was a
3 tangential issue in criminal court. She was one of many named and
4 unnamed potential victims. It was unimportant to the government's
5 case whether Plaintiff was or was not a specific victim. For Count
6 I of the criminal case it was unimportant whether Plaintiff was the
7 target of a child trafficking conspiracy; so long as any young
8 woman was the target and the co-defendants had conspired, the
9 elements were met. For Count II of the criminal case it was
10 unimportant whether Plaintiff or any one actually received a
11 controlled substance so long as Boehm conspired to provide cocaine
12 to any young woman. Thus, her status was tangential to the
13 government's case because it could proceed without her as long as
14 some "overt act" could be used as the basis for each of the
15 conspiracy counts. Her status was not actually litigated. It was
16 not raised, contested, or submitted for determination by the court.
17 Raspanti, supra. Nor did the government have sufficient motivation
18 to litigate this as a primary issue.

19
20 Her status was also tangential to Boehm's defense of the
21 charges. Boehm had no incentive to defend the charges simply
22 because Plaintiff's name appeared as a potential victim so long
23 some other event could be used to support the government's
24 conspiracy theory. It would, in fact, have been counterproductive
25 to his defense to continue litigation simply because she was a
26 potential victim rather than resolve the case with the government
27 based on an agreement to overt act which did not necessarily
28

1 involve her. Thus, Plaintiff's status as a victim was not resolved
2 in the first case by a judgment on the merits. It was not "actually
3 litigated" nor decided as required. There is no final judgment
4 regarding it nor was it essential to resolution of the plea
5 agreement.

6 Plaintiff cannot maintain her burden of proving that sexual
7 abuse, drug delivery or other issues involving tortuous conduct
8 toward her were "necessarily" resolved by the plea agreement.
9

10
11 **C. Collateral Estoppel can not be applied because Boehm did not**
12 **have a full and fair opportunity to litigate the issues in the**
13 **prior proceeding.**

14 Collateral estoppel may occur only where the opportunity for
15 full and fair litigation existed in the initial proceeding. Allen
16 v. McCurry, 449 U.S. 90, 95 (1980); Montana v. United States, 440
17 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v.
18 University of Illinois Foundation, 402 U.S. 313, 328-29 (1971).
19 "Redetermination of issues is appropriate when there is reason to
20 doubt the quality, extensiveness, or fairness of the procedures
21 used in the prior litigation." Montana v. United States, 440 U.S. at
22 164 n. 11. Concerns regarding the fairness of estoppel arise where
23 the subsequent proceeding offers "procedural opportunities
24 unavailable in the first action that could readily cause a
25 different result". Monarch, 192 F.3d at 304. Here procedural
26 mechanisms crucial to Boehm's ability to gather probative evidence
27 to the specific claims now made were either not available or
28 available to such a lesser degrees in the sentencing proceedings

1 that he lacked a sufficiently fair opportunity to litigate the
2 issues relevant here in the prior proceeding.

3 There is no federal right to pretrial discovery in a criminal
4 case. See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is
5 no general constitutional right to discovery in a criminal case and
6 *Brady* did not create one.") The information provided to Boehm in
7 the criminal case was provided as a matter of discretion not of
8 right. There is no doubt that he was denied access to most of the
9 information in the government's possession, including a copy of
10 Plaintiff's testimony to the grand jury and interviews she may have
11 had with the U.S. Attorney's office.
12

13 In contrast, federal rules of civil litigation afford a civil
14 defendant extensive access to information regarding the plaintiff's
15 case. In the civil case Boehm has recourse to the full array of
16 discovery procedures including interrogatories, requests for
17 admissions, document requests, depositions and so forth. The
18 differences in the procedural opportunities available to Boehm in
19 the criminal and civil proceedings mean that he lacked a
20 sufficiently fair opportunity to litigate the issues sought to be
21 precluded here so that collateral estoppel should not apply. See,
22 *United States v. U.S. Currency in the Amount of \$119,984.00 More or*
23 *Less*, 304 F.3d 165 (2nd Cir. 2002).
24

25 The inadequate access to discovery in the federal criminal
26 proceeding when compared to the broad protections afforded to civil
27 litigants in federal civil court raise the same concerns and lead
28 to the conclusion Plaintiff's motion should be denied. It would

1 offend notions of due process and fundamental fairness to give
2 preclusive effect to a federal conviction when the lack of
3 discovery means the prerequisite opportunity to fully and fairly
4 litigate prior to invocation of collateral estoppel does not exist.
5 That is particularly true here where the limited evidence available
6 to Boehm gave no indication a subsequent civil suit was
7 foreseeable.

8
9 **V. CONCLUSION**

10 For the reasons contained herein the court should concluded
11 that the plaintiff cannot clearly demonstrate that (1) the elements
12 of her tort claims have been met through the plea agreement, (2)
13 the issues decided in the federal criminal case against Boehm are
14 identical to the elements of her asserted tort claims; (3) the
15 issues were resolved in the first action by a final judgment on the
16 merits; and (4) the determination of the issues were essential to
17 the final judgment. In addition she has not proven that Boehm had a
18 full and fair opportunity to litigate the points she seeks to
19 presumptively establish. Therefore, the motion for partial summary
20 judgment should be denied.

21
22 July 26, 2006

KENNER LAW FIRM, P.C.

23
24
25 By: 

26 David E. Kenner,
27 Attorney for Defendant Josef F. Boehm
28